1990

State of Utah v. Ellis R. Blackwell : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	CASE NO. 900262-CA
vs.	:	
ELLIS R. BLACKWELL,	:	Brief #2
Defendant.	:	

BRIEF OF APPELLANT

An appeal from the conviction of Appellant in the Second District Court, County of Weber, State of Utah, the Honorable Ronald O. Hyde presiding.

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JURISDICTION

Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code Annotated, Section 77-35-26 (2)(a) (1987), and also pursuant to Rule 3(a) of the Rules of the Utah Court of Appeals. This Court has jurisdiction to hear the appeal under Utah Code Annotated, Section 78-2a-3 (f) (1989), because the appeal is from a District Court in a criminal matter involving a Third Degree Felony.

NATURE OF THE PROCEEDINGS

This is an appeal from the final order of the District Court, Judge Ronald O. Hyde presiding, denying Defendant's Motion to Suppress Evidence dated the 27th day of February, 1990.

DATE OF DECISION

Defendant entered a plea of guilty to the charge of possession of a controlled substance, a Third Degree Felony, on the 13th day of April, 1990, reserving at the time of plea the right to appeal the decision of the Court relative to Defendant's Motion to Suppress Evidence. Defendant was sentenced to serve a

term not to exceed five years at the Utah State Prison. He was granted credit for time served.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

WHETHER OR NOT THE EVIDENCE OBTAINED AS A RESULT OF A URINALYSIS TEST SUBMITTED TO BY REASON OF A PAROLE AGREEMENT CAN BE USED AS EVIDENCE TO SUBSTANTIATE A NEW AND INDEPENDENT CHARGE.

STATEMENT OF THE CASE

The Defendant, Ellis R. Blackwell, was paroled by the Board of Pardons of the State of Utah and signed an agreement setting forth the conditions of that parole on the 19th day of June, 1989. One of the special conditions included in the parole agreement was the agreement by Defendant to submit to random urinalysis. On December 7, 1989, at approximately 12:45 p.m., Agent Jerry W. Summers saw the Defendant at Stimpson's Market. Agent Summers reported that the Defendant attempted to flee from him and that he gave chase, ultimately resulting in Defendant's apprehension and being taken into custody. The Defendant was transported to the Weber County jail and booked as a parole violator. The Defendant submitted to a urinalysis at the jail. He was advised by a parole agent that the urinalysis was a condition of his parole. Mike Sargent told the Defendant that all he wanted the urinalysis for was a comparision with a prior test. The urinalysis test came back positive for illicit drugs. The Defendant was charged with, among other things, possession of a controlled substance, a Third Degree Felony, on or about the 13th day of December, 1989.

SUMMARY OF THE ARGUMENT

It is the Defendant's position that the results of a urinalysis test submitted to by reason of the provisions of a parole agreement and taken while in custody should have been suppressed so far as its use in the prosecution of a new and

independant charge for possession of a controlled substance is concerned.

ARGUMENT

Section 77-27-3, UCA (1953) as amended, grants to the parole board alone the authority to impose conditions of parole. Those conditions must bear a reasonable relation to the crime for which the Defendant is being paroled and to the goal of rehabilitation. The logical extention of the language set forth in Section 77-27-3 would limit the use of evidence obtained as a result of the implementation of those parole conditions to those areas wherein the parole board and the parolee agreed to be impacted. The parole agreement in question specifically states that violation of the agreement, and/or any conditions thereof, or (emphasis added) any new conviction for a crime, may result in action by the board causing parole to be revoked or the parole period to begin anew. The agreement itself implies that the conditions are imposed to insure compliance with the parole. Evidence obtained by reason of a warrantless search and as a result of self-incriminating urinalysis should properly be limited so as to impact the Defendant's prior sentence only. To hold otherwise is to say that a parolee really has no 4th or 5th Amendment rights as guaranteed by both State and Federal Constitutions.

Parolees definitely have 4th and 5th Amendment rights. The liberty of a parolee includes many of the core values of unqualified liberty and and a parolee has a right to enjoy a significant degree of privacy. State v. Fields, 686 P.2d 1379 (Hawaii, 1984). In the above case, the Hawaii court also said a consent search obtained in an inherently coercive situation is not a lawful consent. In the instant case the search of the Defendant and his bodyfluids was required by his parole agreement. Defendant either consented to the test or his parole could be violated and Defendant's parole revoked. Such a

condition is inherently coercive at least as far as it's use to substantiate a new charge is concerned.

The Defendant does not allege that the search pursuant to the parole agreement is invalid for all purposes. Defendant alleges that the search is improper only for purposes exceeding the scope of the agreement. The State seeks to justify a warrantless search and seizure on the basis that it was consented to by the Defendant in his parole agreement. To that proposition Defendant takes no offense. It is where the State seeks to use that same evidence to substantiate an entirely independant crime that we object and assert that constitutionally guaranteed freedoms are being trampled on.

There is no question that self-incriminating statements made during a custodial interrogation wherein evidence is being sought upon which to base new charges must conform to the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). Defendant asserts that to the extent that the evidence obtained is being used to support new charges, the requirements in Miranda and the 4th and 5th Amendments apply. There is a difference between evidence obtained by reason of an agreement which is a condition of parole being used as grounds to violate one's parole and using the evidence so obtained to maintain a separate criminal offense.

Parolees may be required to provide incriminating evidence by correction officials for legitimate correction interest. State v. Fogarty, 610 P.2d 140. But this case, which involved a clause in a probation agreement which allowed any law enforcement officer to conduct a warrantless search of the Defendant's person, residence, or vehicle at anytime, stands for the proposition that such a provision is too broad. The Court in this case stated that the purpose of the search must be related to the Defendant's prior conviction or rehabilitation. The Court implied that such provisions are not valid for use to facilitate future investigation of crimes.

In State v. Wilson, 521 P.2d 1317 (Oregon, 1974), a convicted Defendant objected to a probation provision requiring her to submit to a polygraph examination every ninety days. The Court said, "The results of the examination can be used as evidence in further proceedings in this case and in the determination of the Defendant's probationary status; however, the results cannot be used in any other case without Defendant's consent". Parole revocation hearings are not considered criminal proceedings and therefore do not trigger 4th and 5th Amendment rights. State v. Age, 590 P.2d 759 (Oregon, 1979). This case held that a condition requiring a probationer to submit to polygraph tests did not violate 5th Amendment rights. However, the Court further said that such a requirement would be improper if the district attorney had power to make such a request. Clearly the implication is that a distinction is drawn between use of evidence obtained as a result of a probation agreement as it relates to the Defendant's probation and its use as evidence in an independant criminal action.

The Court in State v. Evans, 252 N.W.2d (Wisc. 1977) recognized the distinction which the Defendant asserts is applicable to this case. In this case the Defendant refused to account for his whereabouts as required by his probation agreement, invoking his 5th Amendment privilege against self-incrimination, and his probation was revoked as a result. The court said,

> We resolve this issue by holding that statements or the fruits of statements made by a probationer to his probation agency or in a probation revocation hearing in response to questions which as here, are the result of pending charges or accusations of particular criminal activity, may not be used to incriminate the probationer in a subsequent criminal proceeding. We reaffirm past decisions holding that a probationer's refusal to account for his whereabouts and activities is a serious violation of probation conditions which may merit revocation.

In Evans, supra, the Defendant was not made aware that any statements he made could not be used against him in subsequent criminal proceedings. As a result, the court reversed and

remanded the case. In the instant case, the Defendant was told specifically that submitting to the urinalysis test could not be used against him in a subsequent criminal prosecution. Nevertheless, this is exactly what the State has done.

The State relied on two cases to support its position at the suppression hearing. The first was Minnesota v. Murphy, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). In that case a Defendant sought to suppress testimony concerning his confession made during a meeting with his probation officer with whom he was required to meet as a condition of his probation following his conviction on an earlier, and separate charge. The Minnesota Court ruled that the confession was admissible because the Defendant was not "in custody" at the time of the statement and the confession was neither compelled nor involuntary. The Minnesota Court discussed the question of compulsion as it relates to statements by a probationer to his probation officer. The Court, quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973), stated, "A Defendant does not lose this protection (referring to his 5th Amendment rights) by reason of his conviction of a crime; not withstanding that the Defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted". The appellant contends that the urinalysis test taken while the Defendant was in custody and pursuant to a parole agreement results in the Defendant being compelled to incriminate himself within the meaning of the 5th Amendment. The Minnesota Court convincingly states the reason why the urinalysis test in the instant case should not be admissible against the Defendant upon a new and independant charge when it says, "A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the

questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answer would be deemed compelled and inadmissible in a criminal prosecution". In a separate opinion written by Justice Marshall and joined by Justice Stevens and Justice Brennen, again citing Lefkowitz v. Turley, supra, it is stated that "a probationer retains the privilege enjoyed by all citizens to refuse, 'to answer offical questions put to him in any ...proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings'". The separate opinion goes on to state, "If a truthful response might reveal that he has violated a condition of his probation but would not subject him to criminal prosecution, the State may insist that he respond and may penalize him for refusing to do so. By contrast, if there is a chance that a truthful answer to a given question would expose the probationer to liability for a crime different from the crime for which he has already been convicted, he has a right to refuse to answer and the State may not attempt to coerce him to forgo that right. As the majority points out, if the answer to a question might lead both to criminal sanctions and to a probation revocation, the State has the option of insisting that the probationer respond, in return for an express guarantee of immunity from criminal liability".

The State also relied on the case of State of Utah v. Velasquez, 672 P.2d 1254 (Utah, 1983) to support its position. The Velasquez case however, can be distinguished from the instant case in that in Velasquez, agents seized evidence discovered pursuant to a warrant which was undertaken after a

determination that the parolee was in violation of his parole agreement. The evidence supporting the conviction of the Defendant there was not the same evidence which justified the intrusion into, or the denial of, his constitutional rights. It was not the identical evidence which supported the parole violation.

CONCLUSION

Defendant asserts that as a parolee, he is entitled to the same constitutional rights as other citizens except, and to the extent that those rights are altered by the terms of the parole agreement. The parole agreement and the interest of the Board of Pardons require that an alleged violation based upon evidence obtained as the result fo urinalysis test submitted to because of that parole agreement requirement be limited in its effect to the charges for which the parolee is paroled. To allow the evidence so obtained to form the basis of an entirely new criminal charge or charges makes the parole agents investigations an exercise of a police function not intended by the statutory mandate granted to the parole board by Section 77-27-3, UCA (1953) as amended. Evidence so obtained is clearly the result of compulsory situation. The results of the urinalysis test submitted to by reason of the Dfednants parole agreement while in custody should have been suppressed so far as its use in the pending criminal charge or possession of a controlled substance is concerned, and Defendant respectfully request that this Court reverse his conviction.

Respectfully submitted this 24th day of August, 1990.

STEPHEN A. LAKER
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 24 day of August, 1990, I mailed four true and correct copies of the foregoing Brief of Appellant, postage prepaid to Paul Van Dam, Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah 84114.

STEPHEN A. LAKER
Attorney for Defendant

ADDENDUM

Parole Agreement

Ruling on A Motion to Suppress Evidence

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

PAROLE AGREEMENT

I, ELLIS RAY BLACKWELL, agree to be directed and supervised by Agents of the Utah State Department of Corrections and be accountable for my actions and conduct to Utah State Corrections, according to this Agreement.
I further agree to abide by all conditions of parole as set forth in this Agreement and any additional conditions as set forth by the Utah State Board of Pardons, consistent with the laws of the State of Utah. I fully understand that the violation of this Agreement and/or any conditions thereof or any new conviction for a crime may result in action by the Board causing my parole to be revoked or my parole period to start over.

CONDITIONS OF PAROLE

1. **RELEASE:** On the day of my release from the institution or confinement, I will report to my assigned Parole Agent, unless otherwise approved in writing.
2. **RESIDENCE:** I shall establish and reside at a residence of record and shall report such residence or any change thereof to my Parole Agent. I shall not leave the State of Utah without prior written authorization from my Parole Agent. It is hereby acknowledged that should I leave the State of Utah without written authorization from my Parole Agent, that I hereby waive extradition from any state in which I may be found, to the State of Utah.
3. **CONDUCT:** I shall obey all State and Federal laws and municipal ordinances at all times.
4. **REPORT:** I shall make written or in person reports to my Parole Agent by the fifth of each and every month or as directed and I shall permit visits to my place of residence as required by my Parole Agent for the purpose of insuring compliance with the conditions of parole.
5. **EMPLOYMENT:** I will seek and maintain full-time employment unless I am participating in an educational or therapy program approved by my Parole Agent.
6. **SEARCH:** I agree to allow a Parole Agent to search my person, residence, vehicle, or any other property under my control, without a warrant, any time day or night, upon reasonable suspicion as ascertained by a Parole Agent, to insure compliance with the conditions of my parole.
7. **WEAPONS:** I shall not own, possess, or have under my control any explosives, firearms, or any dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.
8. **ASSOCIATION:** I shall not associate with any known criminal in any manner which can reasonably be expected to result in, or which has resulted in criminal or illegal activity.
9. **SPECIAL CONDITIONS:** I shall:
   1. Pay restitution of $399.75. 2. Submit to random urinalysis.
   3. Successfully complete Substance Abuse Therapy.
   4. Not consume or possess any alconol. 5. Successfully complete ISP Program.
   Amended 5/15/1989

I have read, understand and agree to the above conditions and I hereby acknowledge receipt of a copy of this Agreement.

WITNESSED BY: Jim Allen this 19 day of JUNE, 1989

TITLE: _____ SIGNED: Ellis R Blackwell
Parolee

ADDRESS: 1021 20th
Ogden Ut

Paul W Sheffield
Administrator, Board of Pardons

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ELLIS R. BLACKWELL, Defendant.	}	RULING ON A MOTION TO SUPPRESS EVIDENCE Case No. 891920157

Having read the briefs and cases submitted, I hold that evidence obtained as a result of a urinalysis test submitted to by reason of a parole agreement can be used as evidence to substantiate a new and independent charge.

Motion to suppress evidence is denied.

DATED this 27 day of February, 1990.

RONALD O. HYDE, Judge